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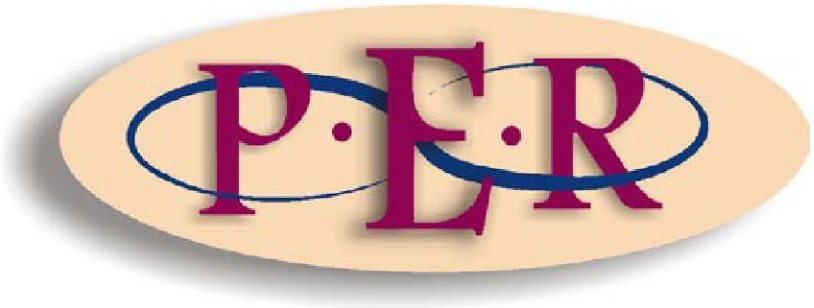

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REASONS FOR PROSECUTORIAL DECISIONS

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1 Introduction

The *Constitution* empowers the National Prosecuting Authority (NPA) to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.[1] The NPA is an institution integral to the rule of law and it is important that it acts in a manner consistent with the constitutional prescripts and within its powers.[2] The decision to prosecute or decline prosecution is a serious step that may affect accused persons and their families, victims, witnesses and the public at large and must be undertaken with the utmost care.[3] A recent judgment of the Supreme Court of Appeal,[4] for instance, held that the failure of the prosecution to exercise sensible discretion and decline to prosecute had led a matter without any merit to be pursued to that court. The expenditure of time and effort, and the costs to the public purse and the appellants had been considerable. These included emotional costs and the convictions that hung over their heads. This contribution aims to address the nature of the duty resting on South African prosecutors to provide reasons for the decision to prosecute or decisions to decline or discontinue a prosecution.

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1 Section 179(2) *Constitution of the Republic South Africa*, 1996 (hereafter referred to as the *Constitution*).

2 *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 3 SA 486 (SCA) para 45.

3 See for instance NPA 2014 http://www.npa.gov.za/ReadContent504.aspx 5 (hereafter *Prosecution Policy*) and Crown Prosecution Service, England and Wales *Code for Crown Prosecutors* 3 para 2.1.

4 *S v Macrae* 2014 2 SACR 15 (SCA) paras 1, 30.

2 Prosecuting policy on the discretion to prosecute and reasons

In accordance with constitutional requirements[5] the National Director of Public Prosecutions (NDPP) issued a prosecution policy[6] and policy directives[7] which must be observed in the prosecution process. The prosecution policy requires from prosecutors when deciding whether or not to institute criminal proceedings against an accused to assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced with or continued.[8] When evaluating the evidence, prosecutors should take into account all relevant factors, including the strength of the case for the state; the admissibility of the evidence; the credibility of state witnesses; the reliability of the evidence; the availability of the evidence and the strength of the defence case.[9] Once the prosecutor is satisfied there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow unless public interest demands otherwise. When considering whether or not it will be in the public interest to prosecute, the prosecutor should consider factors such as the nature and seriousness of the offence, the interests of the victim and the broader community, and the circumstances of the offender.[10] From the preceding exposition it should be clear that the decision to prosecute rests solely with the prosecutor. His or her discretion is, however, not unfettered in the sense that the jurisdictional facts to be taken into account are left to him or her to determine. The common law prescribes the specific factors to be considered so as to ensure an informed decision. Under the previous constitutional dispensation

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5 Sections 179(5)(a) and (b) of the *Constitution*.

6 *Prosecution Policy* 5.

7 NPA *Policy Directives* (hereafter *Policy Directives*). According to the NPA this document is confidential and, unlike the *Prosecution Policy* not a public document. In *S v Shaik* 2008 2 SA 208 (CC) para 33 it was held that the Policy Manual of the NPA (which at the time contained the Prosecution Policy and the NDPP's Policy Directives) is a public document. The document was nevertheless found on the internet at NPA 2014 http://www.npa.gov.za/UploadedFiles/Prosecution%20Policy%20Directives%20with%20effect%20from%201%20June%202014.pdf. It seems that the link has since been removed.

8 *Prosecution Policy* 5. This is in line with common law requirements. A prosecution will be wrongful if reasonable and probable grounds for the prosecution are absent (*National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 37).

9 *Prosecution Policy* 6. For a general discussion of the issue of prosecutorial discretion, see Du Toit *et al* 2014 *Commentary* 1-36 – 1-39.

10 *Prosecution Policy* 7.

characterised by parliamentary sovereignty, unfettered discretions were often granted statutorily to officials. The most notorious of these probably was section 29 of the *Internal Security Act* 74 of 1982, in terms of which a police official could decide to arrest and detain any person without trial if he or she had reason to believe that such a person endangered the safety of the state. The said section also excluded the jurisdiction of the courts to test the validity of the police official's decision. The legal position concerning the exercise of discretion has changed dramatically in the current constitutional dispensation. In *Dawood v Minister of Home Affairs*[11] the Constitutional Court explicitly stated that guidance must be given with regard to the exercise of broad discretions in order to promote the spirit, purport and objectives of the Bill of Rights. Hoexter therefore correctly states that "the idea of uncontrolled or unguided discretion is hopelessly at odds with modern constitutionalism".[12] This is fully in line with section 195(1)(g) of the *Constitution*, which requires the public administration to be transparent. Part of being transparent is the furnishing of reasons for decisions, and one can expect that the reasons thus supplied will relate to the prescribed factors that were taken into account when the decision was made.

In terms of the NDPP's Policy Directives, prosecutors should record in the docket the reason(s) for declining to prosecute a matter. Prosecutors should entertain requests for reasons for the exercise of their prosecutorial discretion emanating only from persons with a legitimate interest in the matter.[13] The question arises as to what would constitute a legitimate interest. The answer to this question would depend heavily on the circumstances of each case, but it can be declared with certainty that it would in many instances involve more persons than only the complainant and the accused. In this regard it must be emphasised, as has been noted above, that the public interest plays a central role in any decision to prosecute or not. In a constitutional state such as South Africa, prosecutorial decisions have a direct bearing on the fundamental rights of individuals, insofar as crime very often similtaneously involves a violation of one or more of a victim's fundamental rights. In addition, the state has a constitutional

11 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 54.
12 Hoexter *Administrative Law* 47.
13 *Policy Directives* 19.

duty to protect the public against crime.[14] The *Constitution* takes a broad view with regard to the necessary *locus standi* to enforce the rights in the Bill of Rights and explicitly provides *inter alia* in section 38 that anyone acting in the public interest has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened. Against this background it would seem fair to state that the public has a particular interest in prosecutorial decisions. The Supreme Court of Appeal has in fact found that a political party[15] and a public interest organisation involved in the promotion of democracy and the advancement of respect for the rule of law[16] have the necessary *locus standi* to challenge decisions of the NDPP in matters of considerable public interest and national importance.

The right to just administrative action in section 33 of the *Constitution* embodies the right to be furnished with reasons for administrative action. Section 1 of the *Promotion of Administrative Justice Act* 3 of 2000 (hereafter PAJA), however, excludes a decision to prosecute from the definition of administrative action.[17] This does not imply that decisions to prosecute or not should not be accompanied by reasons for the particular decision. In fact, the exclusion of prosecutorial decisions from the definition of administrative action in the PAJA is for the purposes of the PAJA only, and should not be elevated to a general rule that because a prosecutorial decision cannot be equated with an administrative decision, the reasons for prosecutorial decisions could never be important.

In view of the preceding exposition it is suggested that to recognise the interest of the public in obtaining reasons for prosecutorial decisions would be fully in line with the spirit and purport of the *Constitution*. It has long been settled in common law that a negative inference may be drawn from a refusal to furnish reasons for administrative decisions, even when there is no legal duty upon the decision-making functionary to

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14 See *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 44.

15 *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 3 SA 486 (SCA) paras 38-47.

16 *National Director of Public Prosecutions v Freedom Under Law* 2014 2 SACR 107 (SCA) para 18.

17 See para 4 hereunder for a detailed discussion of the legal position pertaining to the review of prosecutorial decisions.

do so. The court in *WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board*[18] explained the position as follows:

> It has repeatedly been held that a body like the Commission is not obliged to give reasons for its decision. But that does not mean that it should not furnish reasons for its decision. By not giving reasons it may run the risk of an adverse inference being drawn... . Whether or not to give reasons is a matter which it must make out for itself in the circumstances of each particular case. Where, as here, the only evidence presented is impressive and acceptable, remains unchallenged in cross-examination and uncontradicted by other evidence, then the failure to give reasons tend to support an inference that the evidence was ignored.

Although it is granted that a commission as in *WC Greyling* could not legally be equated with a prosecutor, and although the PAJA explicitly excludes prosecutorial decisions (for the purposes of the Act) from the definition of administrative action, it is strongly suggested that the principle as enunciated in *WC Greyling* remains relevant and applicable, especially when taken into account that the prosecuting authority is part and parcel of the executive. In a constitutional democracy like South Africa, strong and effective control over the executive is imperative. The furnishing of reasons constitutes an important element in such control. The right to having access to reasons (whether for administrative action in terms of section 33(2) of the *Constitution* as confirmed in section 5 of the PAJA or for prosecutorial decisions) should not be confused with the right of access to information (in terms of section 32 of the *Constitution*). Pertaining to the right of access to information, section 32 establishes the right of an individual to have access to "any information held by the state" as well as "all information that is held by another person and that is required for the protection of any rights". It is interesting to note that no constitutional limitation is placed on the right of individuals to request information held by the state. This is in stark contrast to the right of individuals to request information held by other individuals insofar as the said information may be requested only if it is needed for the protection of any rights of the requesting party. The fact that the *Constitution* itself does not limit the individual's right of access to information held by the state is undoubtedly a strong confirmation of the interest of the general public's right to know.

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[18] *WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board* 1982 4 SA 427 (A) 448C-D.

The scope of the concept of *information* is normally much broader than that of *reasons.* It might or might not include reasons for a decision, depending on at what stage of the decision-making process the request for information is submitted. If the request is submitted before the final decision has been taken it would understandably not include reasons, but if it submitted after the final decision has been taken it might also include the reasons for the particular decision. The right of access to information must be balanced against the right to privacy protected in section 14 of the *Constitution*. In this regard the recently adopted *Protection of Personal Information Act* 4 of 2013 is relevant. In terms of section 2 the purpose of the Act is, broadly speaking, to give effect to the constitutional right to privacy by safeguarding personal information while at the same time protecting the free flow of information within South Africa and across international borders. The Act contains a number of exclusions and determines *inter alia* in section 6(1)(c)(ii) that:

> [t]his Act does not apply to the processing of personal information ... by or on behalf of a public body ... the purpose of which is the prevention, detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures, to the extent that adequate safeguards have been established in legislation for the protection of such personal information.

It is suggested that the exclusion as formulated in section 6 is broad enough to also cover prosecutorial decisions.

When requesting information from the prosecuting authority, the provisions of the *Promotion of Access to Information Act* 2 of 2000 (PAIA) must be taken into account. Section 39 *inter alia* provides that a request for information may be refused if the requested information deals with the methods, techniques, procedures or guidelines for the prosecution of alleged offenders, and the disclosure of the information could reasonably be expected to prejudice the effectiveness of the said methods, techniques, procedures or guidelines, or lead to the circumvention of the law, or facilitate the commission of an offence. A request for information could furthermore be refused in terms of section 39 if the prosecution of an alleged offender is being prepared or about to commence or pending and the disclosure of the information could reasonably be expected to impede the said prosecution or result in a miscarriage

of justice in that prosecution. In addition, section 39 determines that the requested information could be refused if the disclosure could reasonably be expected to prejudice the investigation of a contravention of the law, reveal the identity of a confidential source of information in relation to the enforcement or administration of the law, result in the intimidation or coercion of a witness in criminal or other proceedings to enforce the law, facilitate the commission of a contravention of the law, or prejudice or impair the fairness of a trial or the impartiality of an adjudication. Although the Act grants a discretion to refuse to provide the requested information, it is not a free and unfettered discretion. The Act explicitly requires the decision to refuse to provide the requested information to be reasonable. What would constitute a reasonable decision under the particular circumstances of a specific case is in the final analysis left to the courts to decide. In this regard it is strongly suggested that the grounds for refusal cited by the Act could and should not be interpreted to include a refusal to provide reasons for a decision to prosecute or not. The distinction between reasons and information should be maintained and the latter should not be understood to automatically include reasons for prosecutorial decisions as well.[19]

The Policy Directives of the NPA states that in the interest of transparency and accountability, and in accordance with section 33(3) of the *Constitution*, reasons should as a rule be given upon request. The nature and detail of the reasons given will depend upon the circumstances of each case. In general the *ratio*, rather than specific detail, should be given. Prosecutors should be careful not to infringe the rights of anyone by providing such reasons. Typical reasons for a decision not to prosecute may include that the state would not be able to prove that the accused had the necessary intention to commit the offence in question; that the state would not be able to disprove the defence of the accused; and that the complainant is a single witness, whereas there are several defence witnesses to corroborate the version of the accused person. It also provides that reasons as to why a prosecution is to be

[19] The right to access to the police docket was dealt with by the Constitutional Court in *Shabalala v Attorney-General, Transvaal; Gumede v Attorney-General, Transvaal* 1995 2 SACR 761 (CC).

proceeded with and particular charges formulated must be handled with care in order not to cause embarrassment or unnecessary debate.[20]

The *National Prosecuting Authority Act* provides for a Code of Conduct to be framed by the National Director of Public Prosecutions, which should be complied with by all members of the Prosecuting Authority.[21] In terms of the code, prosecutors should, if requested by interested parties, supply reasons for the exercise of a prosecutorial discretion, unless the individual rights of persons such as victims, witnesses or accused persons might be prejudiced, or where it might not be in the public interest to do so.[22]

3 Transparency and public confidence

Dr Percy Yutar once declared that an attorney-general[23] is not obliged to give reasons for any decision he may take "either to academics, whether they are professors of law or not, or to newspapers which may have misgivings about his decision".[24] Fortunately this approach has given way to a more transparent one whereby the prosecution service does provide reasons for decisions, albeit not necessarily in great detail. Hoexter[25] has identified procedural and substantive benefits for the giving of reasons. An individual whose rights have been affected is in a better position to make the decision to challenge or not to challenge, once reasons for the decision are available. The duty to give reasons can also improve the quality of the decision and the public administration. An official who knows that he or she must give reasons will take greater care not to take an arbitrary or unreasonable decision.[26]

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20 *Policy Directives* 19.

21 Section 22(6)(a) *National Prosecuting Authority Act* 32 of 1998 (hereafter referred to as the NPA Act).

22 GN R1257 in GG 33907 of 29 December 2010 (*Code of Conduct for Members of the National Prosecuting Authority*) Part D para 2(d).

23 Now known as a Director of Public Prosecutions.

24 Yutar 1977 *SACC* 143. Also see the English case of *Gouriet v Union of Post Office Workers* 1978 AC 435 at 487, where it was stated that "The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons."

25 Hoexter *Administrative Law* 463.

26 Hoexter *Administrative* 464. Also see Medwed 2010 *Cardozo L Rev* 2206.

A number of role players may have an interest in the criminal justice system. The decision to prosecute or to discontinue a prosecution is a serious step that affects law enforcement agencies, suspects, victims, witnesses and the public at large, and must be undertaken with the utmost care.[27] The providing of reasons to explain a decision not to prosecute may be of vital importance to maintaining confidence in the administration of criminal justice. The victim of crime may also feel aggrieved by decisions not to prosecute, or decisions to prosecute when the victim is not in favour of a prosecution. In terms of the Service Charter of Victims of Crime in South Africa, victims may request reasons for a decision that has been taken in their case whether or not to prosecute.[28]

Interested parties may also question the nature of the charge brought against the accused. The Canadian directives regarding the conduct of prosecutions[29] underscore the importance of the providing of reasons to achieve confidence in the administration of justice. The Directives provide that reasons should be provided to the police or the investigative agency in serious matters or those of significant public interest when a decision not to prosecute has been made. The reasons must reflect sensitivity to the police or the investigative agency's mandate. The need to maintain confidence in the administration of justice may also necessitate, in certain circumstances, public communication of the reasons for not prosecuting. The communication may occur by way of a statement in court at the time charges are withdrawn, or a media release. In providing reasons, the privacy interests of the victims, witnesses and the accused persons should be considered.[30] In Canada the prosecution is not legally required to give reasons for its core decision-making in terms of the prosecution directives. However, it may be advisable in certain circumstances to offer an explanation for decisions taken in order to help maintain public confidence in the administration of

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27 See, for instance, Crown Prosecution Service, England and Wales *Code for Crown Prosecutors*. This Code was issued by the Director of Public Prosecutions for England and Wales under s 10 of the *Prosecution of Offences Act*, 1985. Also see Public Prosecution Service of Canada *Deskbook* para 3.5. These directives were issued by the Canadian Attorney General in terms of s 10(2) *Director of Public Prosecutions Act*, 1983.

28 DOJ&CD Date Unknown http://www.justice.gov.za/VC/docs/vc/vc-eng.pdf para 3.

29 See fn 5.

30 Public Prosecution Service of Canada *Deskbook* para 3.5.

justice. The Directives also make reference to the judgment *R v Gill*,[31] where it was stated that by offering an explanation the prosecutor clearly enhances the transparency of his or her decision-making process and, hence, the fairness of the proceedings. The Directives require Crown counsel to provide an explanation for a particular decision when it is in the public interest to do so, for example where the basis of the decision is not self-evident and it is reasonably foreseeable that the lack of an explanation would lead the court or members of the public to draw conclusions that attribute erroneous and improper motives to the Crown's exercise of prosecutorial discretions.[32]

Closely related to the issue of accountability and transparency is the argument that a policy of giving reasons for decisions would enhance the fairness and efficiency with which prosecutorial decisions are made, in that prosecutors may be more anxious to ensure that decisions are seen to be fair if a greater range of people are granted access to the reasons for the decision. If a prosecutor knows that the reasons for the decision will be made known to the injured party, he or she will be particularly careful to set out the reasons clearly and logically in a manner which can be defended.[33]

There are also other factors that may necessitate the furnishing of reasons by the prosecution authority in South Africa. The Minister of Justice has the final responsibility over the prosecuting authority. At the request of the Minister the NDPP must provide the Minister with reasons for any decision taken by a DPP in the exercise of his or her duties or the performance of his or her functions.[34] This, however, does not grant the Minister the authority to interfere with decisions to prosecute or not. The Minister is nevertheless entitled to be kept informed where public interest or an important aspect of legal or prosecutorial authority is involved.[35] Prosecutors may also be required by DPPs to provide reasons for decisions not to prosecute, for example in cases where the DPP has received complaints or representations from members of the public.[36] It

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31 *R v Gill* 2012 ONCA 607 para 75.
32 Public Prosecution Service of Canada *Deskbook* para 3.5.
33 Director of Public Prosecutions, Ireland *Discussion Paper* 35.
34 Section 33(2) NPA Act.
35 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 33.
36 Du Toit *et al Commentary* 1-27 - 1-28, regarding the ways in which a DPP can direct and control decisions of public prosecutors.

is submitted that this internal review mechanism provides an important safeguard for sound prosecutorial decisions.

4 Possible problems with detailed reasons

In 2008 the Director of Public Prosecutions of Ireland published a discussion paper in reconsideration of the policy at the time of not giving reasons for decisions.[37] One of the reasons for reconsidering the policy was a case decided in 2003 by the European Court on Human Rights, which appears to be authority for the proposition that reasons are to be given for decisions not to prosecute to the relatives of a deceased person killed by the use of lethal force by agents of the state.[38] The paper pointed to a number of unintended, negative outcomes that could possibly flow from giving reasons for prosecutorial decisions. Giving specific rather than broad, general reasons has the potential in some cases to cast doubt on the innocence of persons who are merely suspected of committing a crime.[39] One of the main arguments against the provision of reasons for not prosecuting in any form is that to do so could cast doubt on the innocence of a suspect without the individual's having the benefit of the protections afforded by the trial process. This could arise even in cases in which a suspect is not named but is readily identifiable given the circumstances of the case. A suspect could be prejudiced even if the people who were in a position to draw an inference as to the identity of the likely suspect were relatively few in number. There are two possible legal arguments against the release of such a statement on this basis alone: the protection of a person's good name and the presumption of innocence.

To give a specific reason, as opposed to a "bland generality" (such as, for example, that the evidence did not permit a prosecution), could in many cases cast doubt on the innocence of a person and thereby violate the presumption of innocence that can be confirmed or rebutted only by a trial in open court where an accused is equally represented.[40] This fact is well illustrated by the ill-advised media statement of a

37 Director of Public Prosecutions, Ireland *Discussion Paper*.
38 Director of Public Prosecutions, Ireland *Discussion Paper* 14-16. The case is reported as *Jordan v United Kingdom* 2003 37 EHRR 52.
39 Director of Public Prosecutions, Ireland *Discussion Paper* 7, 29.
40 Director of Public Prosecutions, Ireland *Discussion Paper* 7, 13.

former National Director of Public Prosecutions regarding the decision not to prosecute the then Deputy President of South Africa. In the course of 2003 the NDPP issued a press statement stating that although there was a *prima facie* case of corruption against the then Deputy President, he would not be prosecuted, as the prospects of success were "not strong enough". This announcement sparked off a media frenzy and a public debate regarding the Deputy President's alleged or suspected involvement in corrupt relationships and improper conduct.[41] The Public Protector found that the press statement made by the NDPP unjustifiably infringed upon the Deputy President's constitutional right to human dignity and caused him to be improperly prejudiced. The Public Protector found the press statement to be unfair and improper. Giving reasons in some cases could violate the presumption of innocence, which is a cornerstone of our legal system, and could create significant injustice. There needs to be careful consideration of the balance between the interest in disclosure to the injured party and perhaps also the wider public, and the need to protect reputation and the presumption of innocence. There is also a need to carefully balance other societal interests. For example, it is important to avoid prejudice to other proceedings.[42]

Giving reasons could erode the standing or reputation of a witness, including the complainant. For example, to say a witness was not thought to be reliable would have the potential for serious psychological consequences as well as attacking the witnesses' right to his or her good name, particularly if the implication was that the witness was not merely incorrect but telling a deliberate untruth. The tension between "competing interests" also arises when balancing the requirements of transparency and accountability in the prosecutorial process with the needs of national security and the duty on the State to vindicate and protect the life and person of every citizen. This could, for example, be compromised by revealing the identity or perhaps even the existence of a police informant.[43] The State must also be careful not to reveal privileged information, such as the names of informants.

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41 Public Protector *Special Report* (hereafter referred to as *Special Report*).

42 Director of Public Prosecutions, Ireland *Discussion Paper* 7.

43 Director of Public Prosecutions, Ireland *Discussion Paper* 8. These problems are discussed in more detail at 29-33. The discussion paper also referred to a number of practical problems such as the

5 Reasons for purposes of review proceedings

The *Promotion of Administrative Justice Act* 3 of 2000 (PAJA) provides for the judicial review of administrative action.[44] The Act excludes "a decision to institute or continue a prosecution" from the definition of "administrative action".[45] In *National Director of Public Prosecutions v Freedom Under Law*[46] (hereafter referred to as *Freedom Under Law*) the Supreme Court of Appeal held that decisions to prosecute and not to prosecute are of the same genus and that, although on the purely textual interpretation the exclusion in PAJA is limited to the former, it must be understood to incorporate the latter as well.[47] The duty to give reasons when rights or interests are affected is an "indispensable part of a sound system of judicial review". Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not, and so may be deprived of the protection of the law.[48] It has been held that where facts gave rise to a *prima facie* inference that the decision was irrational, the failure to give reasons may lead to confirmation of that *prima facie* inference.[49] The court then referred to the judgment of Harms DP in *National Director of Public Prosecutions v Zuma,*[50] where a number of English cases were cited that emphasised the same policy considerations that underlie the exclusion of decisions to prosecute from the PAJA definition of administrative action. The court held that the first principle established by those cases is that in England decisions to prosecute are not immune from judicial review, but the court's power to do so is sparingly exercised. The policy considerations for courts' limiting their own power to interfere in this manner are twofold. Firstly, the independence of the prosecuting authority must be save-guarded by limiting the extent to which a review of its decisions can be brought before a court and, secondly, the wide extent of the discretion (which is not totally unfettered) exercised by the prosecuting authority and the polycentric

risk of increased delay in the criminal process, the need for additional resources and the need for training.

44 Section 6 *Promotion of Administrative Justice Act* 3 of 2000 (hereafter referred to as PAJA).

45 Section 1(ff) PAJA.

46 *National Director of Public Prosecutions v Freedom Under Law* 2014 2 SACR 107 (SCA).

47 *National Director of Public Prosecutions v Freedom Under Law* 2014 2 SACR 107 (SCA) para 27.

48 *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 159.

49 *Judicial Service Commission v Cape Bar Council* 2013 1 SA 170 (SCA) para 51. Also see Hoexter *Administrative Law* 466-467.

50 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 35 fn 31.

character that generally accompanies its decision-making includes considerations of public interest and policy.[51] The court held that the underlying considerations of policy can be no different with regard to decisions not to prosecute or to discontinue a prosecution. Brand JA concluded that although decisions to prosecute are - in the same way as decisions not to prosecute - subject to judicial review, judicial review does not extend to the wider basis of PAJA, but is limited to grounds of legality and rationality.[52] The court then turned its attention to the principle of legality and held that this principle is well established in the law as an alternative pathway to judicial review where PAJA does not find application.[53] Harms JA pointed out that the principle acts as a safety net to give the court some degree of control over action that does not qualify as administrative action under PAJA, but none the less involves the exercise of public power. The court held that it can be accepted with confidence that it includes review on grounds of rationality and on the basis that the decision-maker did not act in accordance with the empowering statute.[54] In *R v DPP, ex parte C*[55] the Queen's Bench after reviewing a number of decisions concluded that a decision not to prosecute may be reviewed because of some unlawful policy; or because the Director of Public Prosecutions failed to act in accordance with the policy set out in the prosecution code, or because the decision was perverse - it was a decision at which no reasonable prosecutor could have arrived.[56] The Constitutional Court has described the nature of the rationality principle as follows:

> It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed

51 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 25.
52 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 27.
53 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 28.
54 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 29.
55 *R v DPP, ex parte C* 1995 1 Cr App R.
56 Du Toit *et al Commentary* 1-22 - 1-26 for a detailed discussion on the powers of the court to interfere in prosecutions.

> it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.[57]

Since decisions to prosecute and decisions not to prosecute are excluded from review in terms of PAJA the question arises whether prosecutors are in any event obliged to give reasons. It is submitted that the obligation to give reasons, if called upon to do so, are implied by the constitutional duty of the NPA to exercise its powers in a way that is not irrational or arbitrary; and by the fact that the NPA is bound to the constitutional values of transparency and accountability.[58] As Brand JA once pointed out: "[i]t is difficult to think of a way to account for one's decisions other than to give reasons".[59] Reasons must be informative and adequate.[60] It is submitted that in the case of the prosecuting authority, general reasons instead of detailed reasons may, in view of the dangers attached to the dissemination of detailed reasons, be adequate. Whether or not reasons are adequate will, however, depend on the factual matrix of each case. It should, however, be noted that a prosecution is not wrongful merely because it is brought for an improper purpose. It will be wrongful only if reasonable and probable grounds for the prosecution are also absent.[61] In *Booysen v Acting National Director of Public Prosecutions v Minister of Police*[62] Gorven J held that the level of disclosure of the NDPP for offences (in that case offences in terms of the *Prevention of Organised Crime Act* 121 of 1998) cannot be such as to prejudice the state in its conduct of a future trial. It will therefore not require an exacting or exhaustive level of disclosure. The court found that it is certainly not necessary to disclose every detail of the state's case, strategy or evidence which is not subject to the criminal discovery process. The court refrained, however, from making a positive finding as to the level of disclosure necessary in meeting an application for review, and stated that it can only be assessed on a case-by-case basis.

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57 *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA* 2000 2 SA 674 (CC) paras 85, 86.

58 *Mphalele v First National Bank of SA Ltd* 1999 2 SA 667 (CC) para 12; *Judicial Service Commission v Cape Bar Council* 2013 1 SA 170 (SCA) para 51. Also see Hoexter *Administrative Law* 463, 470-472.

59 *Judicial Service Commission v Cape Bar Council* 2013 1 SA 170 (SCA) para 51.

60 Hoexter *Administrative Law* 461, 476-481.

61 *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 37.

62 *Booysen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD) para 38.

6 Conclusion

It is important that decisions of prosecutors be consistent and reliable. The approach of the South African prosecuting authority is that reasons should generally be given on request and that, in general the *ratio*, rather than specific detail, should be given. Reasons for the exercise of a prosecutor's discretion should also follow upon requests only from persons with a legitimate interest in the matter. This approach is based on sound reasons of policy. It is clearly in the interests of transparency and accountability that reasons for decisions to prosecute or not to prosecute be given to interested parties. These include victims and their families, law enforcement agencies and witnesses. Prosecutors should, however, also be careful not to infringe the rights of anyone when providing such reasons. The nature and extent of the reasons will therefore depend on the circumstances of each case. The category of persons with a legitimate interest may, however, be broader than merely those with a direct link to the criminal case. Transparent public prosecutions are essential for maintaining the rule of law. Our courts have acknowledged the *locus standi* of public interest organisations and political parties to challenge decisions of the prosecuting authority. Prosecutorial decisions may be reviewed at the very least on grounds of the irrationality of the decision and non-compliance with an empowering provision. Thus far the exact measure of disclosure for the purposes of review proceedings is not clear. If the objective facts point to an irrational decision, the failure to provide adequate reasons may lead to the inference that the prosecutorial decision was indeed irrational.

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LIST OF ABBREVIATIONS

Cardozo L Rev	Cardozo Law Review
DOJ&CD	Department of Justice and Constitutional Development
DPP	Director of Public Prosecutions
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority of South Africa
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
SACC	South African Journal of Criminal Law and Criminology